

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of

McLeodUSA Telecommunications
Services, Inc.

Petition for Preemption of Nebraska Public
Service Commission Decisions Permitting
Withdrawal of Centrex Plus Service by
U S West Communications, Inc.

CC Docket No. 98-84

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OFFICE OF THE SECRETARY

**REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to *Public Notice*, DA 98-1099 (released June 10, 1998), hereby replies to the comments of the Nebraska Public Service Commission (the "Nebraska PSC") and U S West Communications, Inc. ("U S West"), in opposition to the Petition for Preemption, Declaratory Ruling, and Injunctive Relief ("Petition") filed by McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") in the captioned proceeding on May 29, 1998.

As TRA noted in its Comments, Centrex is a key resale vehicle for new entrant local telecommunications providers, including many of TRA's ever increasing number of resale carrier members involved in the resale of local telecommunications services. The importance of Centrex service to the ability of such entities to enter the market through local service resale, an

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entry vehicle specifically provided by the Congress in the Telecommunications Act of 1996,¹ has been echoed by numerous commenters in this proceeding.² Thus, U S West's altogether unconvincing assertion that Centrex is "unsuited as a product in today's market"³ cannot begin to mask its actual rationale for withdrawing Centrex Plus Service: the elimination of the ability of competing carriers to enter the local market through the Congressionally sanctioned avenue of local service resale. U S West also fails in its repeated attempts to misdirect the Commission's focus away from the only relevant issue here, the effective barrier to entry raised by the Nebraska Commission's decision.

When the red herrings are pushed aside, U S West's argument is reduced to nothing more than its intense dislike for resale, a prerogative which, no matter how heartfelt, is insufficient to overturn a Congressional directive. In this instance, that directive is provided by Section 253 which compels the Commission, when presented with a state or local action which has "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,"⁴ to preempt the offending "statute or regulation, or other State or local legal requirement."⁵ The Nebraska Public Service Commission's Order of November 25,

¹ Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

² See Comments of WorldCom, Inc., p. 3 ("in the experience of WorldCom's MFS Communications and Brooks Fiber subsidiaries, Centrex provides an invaluable entry pathway."); Comments of Frontier Telemanagement, Inc. and Advanced Telecommunications, Inc. ("Joint Filers"), p. 2 ("The NPSC's decision to allow U S West to withdraw Centrex has substantially undermined the Joint Filers' ability to provide competitive telecommunications services in Nebraska. . ."); Comments of MCI Telecommunications Corporation ("MCI"), p. 3 ("For many CLECs, reselling Centrex service is currently the most efficient means of entering the local market. . .").

³ Comments of U S West Communications, Inc. ("U S West"), p. 4.

⁴ 47 U.S.C. § 253(a).

⁵ Id.

1996, Docket No. FC-1252, FC-1253 and FC-1254 does precisely that and, accordingly, must be preempted.

U S West is absolutely incorrect that "in order to invoke Section 253, McLeodUSA must document the actual adverse competitive impacts of the Nebraska PSC's decision."⁶ The thrust of U S West's argument is that McLeodUSA is not entitled to bring its preemption petition because, having not yet obtained the ability to offer Centrex services in Nebraska, the carrier has not demonstrated sufficient concrete harm to itself flowing from the Nebraska PSC's Order. Quite the opposite is true. Far from tying the Commission's hands until an entity can demonstrate that it has suffered irreversible competitive harm, Congress has specifically empowered the Commission through Section 253's preemption authority to act *before* such harm is inflicted. Any "State or local statute or regulation, or other State or local legal requirement," if such statute or legal requirement is determined by the Commission to "have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" must be preempted by the Commission.⁷ Nothing in Section 253 requires the demonstration that a particular entity must have already suffered competitive harm in order to bring a preemption petition before the Commission.

Further, the Commission's independent obligation to preempt barriers to entry pursuant to Section 253 does not require it to sit passively waiting for a petition such as McLeodUSA's to be brought before it. Like a declaratory ruling, which the Commission may issue either "on motion or on its own motion,"⁸ the Commission may address the prohibitive

⁶ Comments of U S West, p. 3.

⁷ 47 U.S.C. § 253(a), (d).

⁸ 47 C.F.R. § 1.2.

effect of a statute, regulation or requirement with or without the filing of a petition by any affected party. Having once determined that a barrier to entry has been erected, however, the Commission must act to preempt the effectiveness of that barrier.

U S West also urges the Commission to deny McLeodUSA's preemption petition because, according to U S West, that petition embodies merely McLeodUSA's disagreement with the logic of the Nebraska PSC, a matter into which U S West believes the Commission should not delve.⁹ In actuality, McLeodUSA's preemption petition is based upon the competitive effect which will inevitably flow from implementation of the Nebraska PSC's Order, namely that McLeodUSA -- and every other telecommunications carrier desirous of entering the Nebraska local market today or in the future, will now encounter an impermissible hurdle which U S West itself will never face.

Absent the Nebraska PSC's Order, both U S West and its Centrex Plus Service resale carrier customers would have been able to offer a rich array of telecommunications services, combined in a manner uniquely tailored to meet the telecommunications needs of their respective end-user customers. After entry of the Nebraska PSC's Order, U S West may still offer any of these services to its retail end-users, although the term "Centrex Plus" will never be heard again. The Nebraska PSC's Order allows U S West to essentially continue providing to its own customers services identical to those which a resale carrier would have been able to provide utilizing Centrex Plus Service. Through a mere manipulation of the description of those services as something other than the previously available Centrex Plus Service, however, U S West can ensure that not only McLeodUSA but every potential resale carrier competitor will now be precluded from offering these identical services to their respective end-users. Thus, contrary

⁹ Comments of U S West, p. 3.

to U S West's assertion, McLeodUSA's preemption petition, which vividly describes nothing short of a barrier to entry, presents an inherently appropriate vehicle for Commission consideration pursuant to Section 253.

In its comments, U S West itself reveals the actual motivation behind the carrier's opposition to McLeodUSA's preemption petition. Immensely popular to potential new entrant carriers, and virtually essential to a resale carrier competitor's ability to provide a full complement of services to end users, Centrex facilitates resale and resale can potentially cut into U S West's market share.¹⁰ U S West's fierce opposition to resale is amply demonstrated by its statement that "resale of Centrex in competition with other regulated U S West services" is an "arbitrage vehicle" to which it should not be subjected.¹¹ U S West, understandably protective of its formerly *de jure* monopoly status, has long attempted to characterize resale activities in this pejorative fashion in a misguided attempt to paint resale as "anti-competitive, anti-economic and anti-public interest."¹² While U S West will no doubt maintain this point of view in perpetuity, the Congress has held to the contrary by specifically designating resale as one of the three

¹⁰ Interestingly, at the same time U S West tells the Commission that Centrex is "unsuited as a product in today's market", the company's press releases publicly tout "sales of the company's Centrex product line increased by nearly 50 percent during [first quarter 1998], bringing total access lines equipped with Centrex services to nearly 1.2 million". U S West News Release, April 24, 1998. Of course, in the same press release, U S West also declares itself keenly focused on "becoming the 'carrier's carrier' for telecommunications companies of all sizes", a goal not immediately apparent upon a quick read of the carrier's comments in this proceeding. If such were indeed the case, Centrex services would appear to present an ideally well-suited product in today's market.

¹¹ Comments of U S West, p. 4.

¹² Id. at 6.

coequal "paths of entry into the local market".¹³ And this Commission's support of resale activities as pro-competitive, economically sound and very strongly in the public interest extends back for more than a decade.

Similarly, with the passage of the Telecommunications Act of 1996, the Commission has held that "[c]ompetition in the local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."¹⁴ The Commission has also recognized the hurdles small carriers, as new entrants into the local exchange telecommunications market, would face in confronting entrenched incumbent providers which have "little economic incentive to assist new entrants in their efforts to secure a greater share of this market," noting that even "the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets . . . is not sufficient to ensure that competition will supplant monopolies."¹⁵

The Congress has addressed the above concerns by mandating the elimination of "the most significant economic impediments to efficient entry" as well as removal of "existing

¹³ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 12 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.2d 753 (1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Util. Bd* (Nov. 17, 1997), *pet. for rev. pending sub. nom. Southwestern Bell Tel. Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997).

¹⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, (First Report and Order), 11 FCC Rcd. 15499 at ¶ 4.

¹⁵ Id.

operational barriers to entering the local market"¹⁶ and has empowered the FCC to preempt barriers to entry, whether intended or unintended, pursuant to Section 253. U S West admits, as it must, that "the Commission clearly has the right *and the duty* to preempt state regulatory decisions which have the anticompetitive consequences described in Section 253 of the 1996 Act."¹⁷ Only U S West, and the Nebraska PSC itself, fail to perceive the Commission's duty to exercise its preemption authority under the circumstances presented here.

Through a series of concerted mischaracterizations, U S West attempts to diminish to the point of nonexistence the significance of record evidence of the competitive harm which will result from the Nebraska PSC's Order. Before the Nebraska PSC, numerous competitive local exchange carriers, including McLeodUSA, AT&T and MCI, protested U S West's proposed withdrawal of Centrex service, documenting "the negative impact the withdrawal of Centrex service would have on the development of local competition";¹⁸ nearly a dozen state commissions have rejected virtually identical requests by U S West to withdraw critical Centrex service offerings because of the anticompetitive effects which grant of U S West's request would engender;¹⁹ commenters in this proceeding have reiterated McLeodUSA's very real concern that, absent preemption, the Nebraska PSC's Order will irreparably retard, or worse yet, prevent the development of local competition in the State of Nebraska. In TRA's view, the Commission has before it more than sufficient evidence to support a determination that anticompetitive results will

¹⁶ *Id.* at ¶¶ 11, 16.

¹⁷ Comments of U S West, p. 3.

¹⁸ Comments of MCI, p. 2.

¹⁹ *See* Petition, pp. 21-23; Comments of Joint Filers, p. 2; Comments of U S West, p. 6.

flow from the Nebraska PSC's Order. Accordingly, the Commission should act without delay to grant the preemption petition of McLeodUSA.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to issue, as requested by McLeodUSA Telecommunications Services, Inc., a "declaratory ruling and accompanying injunction, ordering that the parts of the Order of the Public Service Commission of Nebraska dated November 25, 1996, Docket No. FC-1252, FC-1253 and FC-1254 which allow the withdrawal by U S West of Centrex Plus service, violate and are preempted by 47 U.S.C. § 251(c)(4)(B) and are therefore null and void."²⁰

Respectfully submitted,

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²⁰ Petition at 28.

CERTIFICATE OF SERVICE

I, Catherine M. Hannan, hereby certify that a true and correct copy of the foregoing document has been served by United States First Class Mail, postage prepaid, to the individuals listed on the attached service list, this 27th day of July, 1998.


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